TELEKOM MALAYSIA BHD

v.

RAMLI AKIM

COURT OF APPEAL, PUTRAJAYA
JAMES FOONG JCA
RAUS SHARIF JCA
ABDULL HAMID EMBONG JCA
[CIVIL APPEAL NO: S-02-800-2005]
25 OCTOBER 2007

ADMINISTRATIVE LAW: *Judicial review - Merits, consideration of - Award of Industrial Court - Compensation - Backwages - Relevant factors - Whether ought to be limited to 24 months - Industrial Court Practice Note No. 1 of 1987 - Loss of future earnings - Whether there was basis to award*

LABOUR LAW: *Industrial Court - Award - Judicial review - Compensation - Backwages - Relevant factors - Whether ought to be limited to 24 months - Industrial Court Practice Note No. 1 of 1987 - Loss of future earnings - Whether there was basis to award*

This was an appeal against the decision of the High Court dismissing the appellant's application for judicial review to quash an Industrial Court award in favour of the respondent. The respondent was an employee of the appellant who had brought an action for constructive dismissal against the appellant. In the present appeal, the following monetary compensation awarded by the Industrial Court to the respondent required consideration: (i) backwages from the date of dismissal, 1 June 1997, to the last date of hearing on 21 November 2001 (amounting to 53 months), without limiting the award of backwages to 24 months in line with the Industrial Court Practice Note No. 1 of 1987 ('Practice Note'); and (ii) loss of future earnings (an additional 57 months of salary), with the Federal Court case of *R Rama Chandran v. The Industrial Court of Malaysia & Anor* ('*Rama Chandran*') cited as the authority for doing as such.

Held (allowing the appeal)
Per Raus Sharif JCA delivering the judgment of the court:

(1) While the quantum of backwages is very much at the discretion of the Industrial Court, the Industrial Court must, in exercising its discretion, do so in accordance with the

established principles of justice and fairness. It is for this reason and to avoid arbitrariness in the award of backwages that the Practice Note was formulated. To depart from the general practice, without good reason, would cause undue variation to the existing process of awarding and assessing backwages. On the facts of this case, there were no justifiable circumstances to warrant the departure from the Practice Note. Although there was a considerable delay in the completion of the hearing, the appellant could not be said to be solely responsible for the delay. It may be true that the appellant had requested for an adjournment, but that only occasioned a minimal delay of ten months. The Industrial Court failed to consider that although the respondent had filed his unfair dismissal claim in 1997, the Minister only referred the case to the Industrial Court on 30 October 1999, which was more than two years after the said dismissal. Thus, it was unfair for the Industrial Court to award the respondent full backwages without limiting the same to 24 months as it had the effect of punishing the appellant for the delay caused by the Minister as well as the Industrial Court itself. By failing to consider the said relevant matters, the Industrial Court had committed an error of law. (para 14, 15 & 16)

(1a) The Industrial Court had also erred in considering the following irrelevant factors: (a) that the respondent's venture into business after his alleged dismissal was not successful; (b) that the respondent had been an employee all his working life and to make a switch at such a late stage of his working life as a businessman would not be beneficial to him; and (c) that the respondent had been out of touch with his previous position for such a long time and would not likely be employed in a similar position elsewhere. Such factors were irrelevant to the issue of backwages. The appellant should not be made responsible for the respondent's failure in business. The respondent's conduct and decision in venturing into his eventually unsuccessful business was something not within the appellant's control. This was precisely what the Industrial Court erroneously took into account. It was for the above reasons that the award on backwages ought to be reduced to 24 months in line with the Practice Note. (paras 17, 18 & 19)

(2) *Rama Chandran* is an exceptional case wherein the award of compensation should be read within the parameters of the factual circumstances of the case. *Rama Chandran* is not an authority to support the proposition that in all cases of unfair dismissal, future loss of earnings must be awarded. One crucial point that must be noted in *Rama Chandran* was that the Federal Court never awarded compensation *in lieu* of reinstatement. Hence, this could be the basis as to why future loss of earnings was awarded. However, in the present case, the Industrial Court had already granted backwages and compensation *in lieu* of reinstatement to the respondent. There was therefore no basis for the court to award future loss of earnings to the respondent. Future loss of earnings has never been an established and recognised head of damages in the Industrial Court, save for the case of *Rama Chandran*. Thus, the Industrial Court, in awarding future loss of earnings to the respondent, had misconstrued the *ratio* of the case of *Rama Chandran*. The Industrial Court had failed to appreciate that the ruling in *Rama Chandran* on compensation was peculiar to the facts of the case and not intended to be of general application in all Industrial Court cases. Therefore, the Industrial Court's award for future loss of earnings ought to be set aside. (paras 21, 22 & 23)

Case(s) referred to:

Chan Hock Liong v. Associated Motor Industries (M) Sdn Bhd [1998] 3 CLJ Supp 105 ***(refd)***

Dr James Alfred v. Koperasi Serbaguna Sanya Bhd & Anor [2001] 3 CLJ 541 FC ***(foll)***

Edaran Otomobil Nasional Sdn Bhd v. Neoh Hock Lye, Quah Poh Huat, Lee Cheow Lian [1990] 1 ILR 163 ***(refd)***

JT International Tobacco Sdn Bhd v. Lau Thow Sin [2006] 2 CLJ 79 HC ***(refd)***

Koperasi Serbaguna Sanya Bhd (Sabah) & Anor v. Dr James Alfred (Sabah) & Anor [2000] 3 CLJ 758 CA ***(foll)***

Nestle Food Store Storage (Sabah) Sdn Bhd v. Terrence Tan Nyang Yin [2002] 1 ILR 280 ***(foll)***

R Rama Chandran v. Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(dist)***

Sarawak Shell Bhd v. Peter Lenjau & Anor [2004] 2 ILR 37 ***(refd)***

Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union [1992] 1 ILR 101 ***(refd)***

Vadiveloo Munusamy v. General Tyre Retreaders Sdn Bhd [1999] 7 CLJ 596 HC ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, s. 20
Rules of the High Court 1980, O. 53

For the appellant - Christopher Chong KH; M/s Lind Willie Wong & Chin
For the respondent - Rizman Borhan; M/s Ansari & Co

[Appeal from High Court Kota Kinabalu; Application for Judicial Review No: K-25-23-2004]

Reported by Suresh Nathan

JUDGMENT

Raus Sharif JCA:

[1] This is an appeal against the decision of the High Court dated 24 June 2005 which dismissed the appellant's application for judicial review to quash the Industrial Court Award No. 1237 of 2004 under O. 53 of the Rules of the High Court 1980. We heard the appeal on 24 July 2007 and unanimously allowed the appeal with costs.

[2] The brief facts of the case are these. The respondent was employed by the appellant (formerly known as Jabatan Telekom Malaysia) as Pembantu Teknik Rendah on 5 July 1972. Over the years, the respondent was promoted several times. On 16 February 1996 he was holding the post of Head of Human Resources, Sabah.

[3] Towards the end of 1996 there was a reorganisation of the appellant. Under the reorganisation, the respondent was emplaced as Assistant Manager with a monthly salary of RM3,042. A dispute arose. To the respondent, his placement as an Assistant Manager was a demotion.

[4] During the same period, the appellant was implementing a Voluntary Reduction Programme ("VRP"). The respondent was invited to participate in the package under the VRP. On 27 May 1997 the respondent accepted the VRP. The respondent service was terminated on 1 June 1999 pursuant to the VRP scheme. He was paid RM114,075.

[5] It was the contention of the respondent that he was forced to accept the VRP scheme. He alleged that the VRP was done in bad faith and his service was wrongfully terminated by the appellant.

[6] The respondent, thereafter made representations under s. 20 of the Industrial Relations Act 1967 ("the Act") to the Industrial Relation Department complaining that he had been constructively dismissed without just cause and excuse. On 30 October 1999, the Minister of Human Resources ("Minister") referred the matter to the Industrial Court.

[7] The Industrial Court in Award No. 928 of 2002 dated 1 November 2002 ("1st Award") ruled that the respondent was constructively dismissed without just cause and excuse. In making the 1st Award, the learned Chairman noted that parties should be given a chance to be heard on the issue of appropriate remedy and directed parties to appear before the court on a date to be fixed by the court.

[8] On 28 September 2004, the Industrial Court handed down Award No. 1237 of 2004 ("2nd Award"). The Industrial Court held that it was not proper or expedient to grant the respondent the normal relief of reinstatement. It therefore awarded the respondent the following monetary compensations.

(i) (a) Backwages from the date of dismissal (01.06.1997) to the last date of hearing on 21.11.2001

RM3,042.00 x 53 months = RM161,226.00

(b) Loss of future earning:

Claimant was born on 13 June 1954 and his present age is therefore 50 years 3 months. He would reached 55 years of age on 13 June 2009 i.e. almost another 57 months from the date of the Award. For loss of future earning, I would award:

RM3,042.00 x 57 months = RM173,394.00

(ii) Compensation in lieu of reinstatement (one month salary for every completed year of service i.e. from 1972 till 1997):

(RM3,042.00 x 25 years = RM76,050.00

Total amount	RM410,670.00
Less VRP taken	RM114,000.00
Balance due to the claimant	RM296,670.00

[9] The appellant then moved the High Court for an order of *certiorari* to quash the 2nd Award. On 24 June 2005 the High Court dismissed the application. Hence, this appeal. As stated earlier we allowed the appeal with costs and made the following orders:

(i) Varied the award on backwages by limiting it to 24 months;

(ii) Set aside the award on loss of future earnings.

We now give our reasons:

Limiting The Backwages To 24 Months

[10] The basic approach in awarding backwages has been that the workman is awarded a sum of backwages arrived at by multiplying his monthly remuneration with the number of months between the date of his dismissal and the date of the award. However, there is a general practice of limiting the award of backwages to 24 months. This is in line with Industrial Court Practice Note No. 1 of 1987 ("Practice Note") which stipulates as follows:

> (a) Back pay in full from the date of dismissal to date of conclusion of heaving, subject to 24 months.

[11] In the present case, the Industrial Court has chosen to depart from the general practice. The reasons are as follows:

> (i) the applicability of the said Practice Note is not mandatory requirement in all cases and certainly it does not mean that it is contrary to established principle of equity and good conscience of good industrial relations practice if the court does not apply the said Practice Note in the particular circumstances of the case where justice of the case requires otherwise.
>
> (ii) though the general practice is to limit backwages to 24 months, however there can be situations where the Court on justifiable grounds need not be subjected to the limit of 24 months.

(iii) none of the cases cited by the Company's Counsel state that the Court cannot use its discretion on justifiable grounds to exceed the 24 months' limit when awarding backwages. The application of 24 months' limit in the cases cited by the Company's Counsel might have been appropriate on the parts of these particular cases.

(iv) the application of the 24 months' limit in awarding backwages is a question of fact depending upon all the circumstances of each case. The overriding principle to be applied at the end of the day is that when awarding compensation *in lieu* of reinstatement and backwages, this Court will be guided by what is reasonable and fair to both parties in all the circumstances of the case.

[12] The learned High Court Judge agreed with the Industrial Court and said it in the following words:

> Only the Industrial or High Courts and the Appellate Courts have the jurisdiction to interpret law as to the amount of the number of month of backwages that can be awarded and they can make their decision upon an interpretation of the relevant law and not directed to do so as the said Practice Note attempt to do so. The law that calls for interpretation is s 30 of the Industrial Relations Act and there is no pre-set limit there as to the number of months of backwages that can be awarded. In fact the Federal Court in *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 had allowed 88 months of backwages. Therefore it is not wrong in law that an award of backwages exceeded the 24 months mentioned in the said practice direction.

[13] We are in agreement with the observations of the Industrial Court as well as the learned High Court Judge on the applicability of the Practice Note. The Practice Note is merely a guideline and *per se* it is not wrong in law for the Industrial Court to award backwages exceeding the 24 months mentioned in the Practice Note. But, we are of the view that there must be justifiable circumstances to warrant a departure from the Practice Note. This is because over the years, the Industrial Court had consistently followed the Practice Note, save in exceptional cases. (See *Sarawak Shell Bhd. v. Peter Lenjau & Anor* [2004] 2 ILR 37; *Nestle Food Store Storage (Sabah) Sdn. Bhd. v. Terrence Tan Nyang Yin* [2002] 1 ILR 280; *Edaran Otomobil Nasional Sdn. Bhd. v. Neoh Hock Lye, Quah Poh Huat, Lee Cheow Lian* [1990] 1 ILR 163; *Syarikat Kenderaan Melayu Kelantan v. Transport Workers Union*

A [1992] 1 ILR 101). The said practice, save in exceptional cases had been approved or endorsed by the High Courts. (See *Chan Hock Liong v. Associated Motor Industries (M) Sdn. Bhd.* [1998] 3 CLJ Supp 105; *Vadiveloo Munusamy v. General Tyre Retreaders Sdn. Bhd.* [1999] 7 CLJ 596; *JT International Tobacco Sdn. Bhd. v. Lau*
B *Thow Sin* [2006] 2 CLJ 79).

[14] Thus, it is our respectful view that while we agree that the quantum of backwages is very much at the discretion of the Industrial Court but the Industrial Court must, in exercising its
C discretion do so in accordance to established principle of justice and fairness. We believe it is for this reason and to avoid arbitrariness in the award of backwages that the Practice Note was formulated. The rationale for limiting backwages to 24 months was well elucidated in *Nestle Food Store Storage (supra)* where the
D learned Chairman of the Industrial Court, Mr. Lim Heng Seng said:

> The prescription of the multiplier of 24 months strikes a right balance between the interests of the parties. It takes into account a realistic and reasonable time frame for the workman to receive
E from the setback of his dismissal. It also taken into account the justifiable concern that delays in the statutory process of conciliation, reference and adjudication should not inflate the quantum of backwages awarded and unduly penalised employers by exorbitant awards which have no rational relationship or nexus
F between loss and liability. The formula affords the workman a monetary backwages which is fair and adequate for loss of earnings arising from his dismissal.

[15] We agree with the above view. To depart from the general practice, without good reasons, would cause undue variation to
G the existing process of awarding and assessing backwages. On the facts of this case, we are of the view that there were no justifiable circumstances to warrant the departure from the Practice Note. For this, the following facts are relevant:

H (i) The respondent was held to be constructively dismissed on 19 May 1997. However, the case was referred to the Industrial Court on 30 October 1999, which was more than two years and five months after the said dismissal.

I (ii) All pleadings were filed expeditiously and the matter was originally fixed for hearing on 2 and 3 January 2001. The aforesaid dates were, however, vacated at the appellant's request and fresh hearing date were given. The matter was

heard from 19 to 21 November 2001. At the conclusion of the hearing on 21 November 2001, the parties were directed to file their respective submissions and submissions in reply. All written submissions were filed by the parties as early as 11 January 2002. The Industrial Court only handed down the 1st Award on 1 November 2002.

(iii) After making the 1st Award, the learned Chairman noted that the parties should be given a chance to be heard on the issue of appropriate remedy. On 21 January 2003, the parties appeared before the learned Chairman for further directions on the matter. The Industrial Court agreed to the parties request to file written submission the issue of remedy.

(iv) On 17 February 2003, the respondent's written submission was filed in court. The applicant then submitted its written submission 10 March 2003. The respondent's written submission in reply was filed on 24 March 2003. *Vide* a letter dated 16 April 2003, the Industrial Court directed parties to make further written submission. Pursuant to the said direction, the respondent filed a further written submission dated 23 April 2003. In response, the applicant filed a further written submission dated 25 April 2003. The respondent then submitted the respondent's written submission dated 30 April 2003.

(v) The Industrial Court Chairman was elevated as Judicial Commissioner in early May 2003. A new Chairman took over the case, and the new Chairman handed the 2nd Award on 28 September 2004.

[16] Obviously there was a considerable delay in the completion of the hearing and the appellant could not be said to be solely responsible for the delay. It may be true that the appellant had requested for an adjournment, but this only occasioned a minimal delay of 10 months. But the Industrial Court failed to consider that although the respondent had filed his unfair dismissal claim in 1997, the Minister only referred the case to the Industrial Court on 30 October 1999, which was more than two years late. Then there was the delay in disposing the case due to circumstances which could not be attributed solely to the appellant. Thus, it is unfair for the Industrial Court to award the respondent full backwages without limiting the same to 24 months as it has the

effect of punishing the appellant for the delay caused by the Minister as well as the Industrial Court itself. By failing to consider the said relevant matters, the Industrial Court had committed an error of law. The award on full backwages is liable to be quashed.

[17] In addition, it is our respectful view that the Industrial Court in granting full backwages exceeding 24 months, had also erred in law in considering the following irrelevant factors (p. 33 of the 2nd Award):

(i) that the respondent's venture into business after his alleged dismissal was not successful;

(ii) that the respondent had been an employee all his working life and to make a switch at such late stage of his working life as a businessman would not be beneficial to him; and

(iii) that the respondent had been out of touch with his previous position for such a long time and would not likely be employed in a similar position elsewhere.

[18] To us, such factors and considerations are irrelevant to the issue of backwages. Why should the appellant be made responsible for the respondent's failure in business. The respondent's conduct and decision in venturing into his eventually unsuccessful business was something not within the appellant's control. This was precisely what the Industrial Court erroneously took into account.

[19] It is for the above reasons that the award on backwages was reduced to 24 months in line with the Practice Note of limiting backwages to 24 months.

(ii) Award For Future Loss Of Earnings

[20] The Industrial Court, in addition to the granting of compensation *in lieu* of reinstatement and backwages to the respondent, had also granted compensation for loss of future earnings amounting to RM173,394 to the respondent which was computed from the date of the final award (28 September 2004) up to the date of respondent's retirement (ie, 13 July 2009). The respondent was, therefore, awarded an additional 57 months of salary as loss of future earnings. The Federal Court case of *R Rama Chandran v. Industrial Court of Malaysia* [1997] 1 MLJ 145 was cited as the authority for doing so. In *Rama Chandran*, the

Federal Court had granted compensation for loss of employment to the dismissed employee from the date of dismissal up to retirement date.

[21] With respect, we are of the view that *Rama Chandran* is an exceptional case wherein the award of compensation should be read within the parameters of the factual circumstances of the case. *Rama Chandran* is not an authority to support the proposition that in all cases of unfair dismissal, future loss of earnings must be awarded. One crucial point which must be noted in the Federal Court decision in *Rama Chandran* is that the Federal Court never awarded compensation *in lieu* of reinstatement. Hence, this could be the basis as to why future loss of earnings was awarded. However, in the present case, the Industrial Court had already granted backwages and compensation *in lieu* of reinstatement to the respondent. There is therefore no basis for the court to award future loss of earnings to the respondent.

[22] Future loss of earnings has never been an established and recognised head of damages in Industrial Court, save for the case of *Rama Chandran.* In *Koperasi Serbaguna Sanya Bhd. Sabah v. Dr. James Alfred (Sabah) & Anor* [2000] 3 CLJ 758, this court ruled that in Industrial law involving compensation for unfair dismissal, there are only two types of compensation, which is backwages and compensation *in lieu* of reinstatement. This court ruled as follows:

> In Industrial law, the usual remedy for unjustified dismissal is an order of reinstatement. It is only in rare cases that reinstatement is refused. For example, as here, where relationship between the parties has broken down so badly that it would not be conducive to industrial harmony to return the workman to his place of work. *In such a case, the Industrial Court may award monetary compensation. Such as award is usually in two parts. First, there is the usual award for the arrears of wages or backwages, as it is sometimes called. It is to compensate the workman for the period that he has been unemployed because of the unjustified act of dismissal. Second, there is an award of compensation in lieu of reinstatement.* (emphasis added)

[23] The above decision of this court was affirmed, on appeal, by the Federal Court in *Dr. James Alfred (Sabah) v. Koperasi Serbaguna Sanya Bhd. (Sabah) & Anor* [2001] 3 CLJ 541. Thus, it is our respectful view that the Industrial Court in the awarding of the future loss of earnings to the respondent had therefore

misconstrued the ratio of the case of *Rama Chandran*. The Industrial Court had failed to appreciate that the ruling in *Rama Chandran* on the compensation was peculiar to the factual circumstances of the case and not intended to be of general application in all Industrial Court cases. We therefore set aside the Industrial Court award for future loss of earnings.

[24] For the foregoing reasons we allowed the appeal as stated with costs and ordered the deposit be refunded to the appellant.